Filed 12/14/01

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RICHARD MARCUM QUILOPRAS, Defendant and Appellant.	A091926 (San Mateo County Super. Ct. No. SC44317B)

On appeal from a judgment of conviction for first degree murder, Richard Quilopras (appellant) contends that various errors occurred regarding witness immunity agreements and that the trial court erred when it: admitted his statements to the police; refused to allow him to refer to the prosecution's failure to call a witness; and denied his motion for new trial based on juror misconduct. We affirm.[1]

Background

The victim, Benjamin Hurwitz, began podiatry practice in 1974. In 1976, the year he was murdered, his daughter, Judy Hurwitz, worked for him as his office manager in San Mateo. She testified that pursuant to a contract, the victim was purchasing the practice over time from Dr. William Moalem, appellant's codefendant, who had been in practice 15 or 20 years and had an additional practice in San Francisco. The victim

[1] By separate order filed this day we deny appellant's petition for writ of habeas corpus. (A096667)

We also file this day our separate opinion in *People v. Moalem,* A088687.

became displeased with the unfavorable level of income the practice was generating compared to Dr. Moalem's promises, and Moalem in turn complained that the victim owed him money. Therefore, they renegotiated their agreement so that Dr. Hurwitz would buy half the San Mateo building, and they insured each other's lives for $60,000, payable to each other, with the policies purchased from insurance agent Sidney Cooper.

When Dr. Hurwitz was practicing in San Mateo, Dr. Moalem practiced primarily in San Francisco, and his then wife, Tania Moalem, helped him in that office. Tania agreed to plead guilty to a lesser charge than murder (accessory to conspiracy to commit murder) and to testify truthfully in exchange for a lesser sentence and probation. She testified that the Moalem's finances were strained, with expenses exceeding income. In December 1975 or January 1976, Dr. Moalem explained a plan to Tania. "He was going to sell a portion of the interest in the San Mateo building to Dr. Hurwitz. Part of the sales agreement was that Dr. Hurwitz would have to take out a $60,000 life insurance policy through Transamerica Insurance Company. The agent that would be handling the insurance would be Sidney Cooper. [¶] William's [Dr. Moalem's] intention was to have Dr. Hurwitz killed for the life insurance policy, that we would have to wait a minimum of six to nine months before this happened so it wouldn't appear suspicious, that we would be responsible for paying the premium on the life insurance policy, and that the arrangements for the murder were going to be handled through Sidney Cooper who had contacts."

Tania wrote three quarterly premium checks for $202 each on the Hurwitz life insurance policy. On August 9, 1976, she wrote what turned out to be the final premium check and gave it to Sidney Cooper. But she made it out for the wrong amount ($149.17, which was the premium amount on Dr. Moalem's policy, which was not yet due). The policy therefore lapsed, and after the murder Dr. Moalem sued the insurance company to collect on the policy. At trial she admitted she lied in that prior proceeding when she testified that the insurance agent had told her the amount of the premium. In fact she had copied it from a prior check stub.

Sidney Cooper testified under a grant of immunity conditioned on his telling the truth. He understood that if he did not tell the truth he would be prosecuted for aiding and abetting murder and for perjury. In the 1970s Cooper bought cocaine and stolen property from appellant. Once he sold some stolen merchandise to Dr. Moalem. On August 9 he collected the premium check from Tania, who placed it in an envelope. Cooper did not look at the check.

Four or five days later, Dr. Moalem called Cooper to his office and asked if he knew someone that would kill Dr. Hurwitz. Dr. Moalem explained to Cooper that "Dr Hurwitz wasn't holding up his end, and that he was a slob and stuff like that." Cooper said he knew someone. He had appellant in mind for the job because he had known him 7 to 9 years and knew he had "done some collections and some strong-arm . . ."

A few days later Cooper went to appellant's home in Daly City and asked appellant whether he would be willing to kill ("off") someone, and appellant said, okay. Cooper asked appellant how much he would want to kill someone, and appellant said $6,000. After two or three days Cooper called Dr. Moalem and said, "The gentlemen [sic] will do it for $6,000." Dr. Moalem said, "Okay." Cooper went back to appellant and gave him Dr. Hurwitz's name and office address, and Dr. Moalem's name and phone number. Appellant agreed to kill Dr. Hurwitz.[2] Appellant scheduled an appointment with Dr. Hurwitz for August 26, 1976, telling Mr. Cooper he did so to "look the area over."

On September 20, 1976, Dr. Hurwitz and his daughter Judy went out for dinner and visited Tania Moalem, who had just had a baby. Dr. Hurwitz dropped Judy off in the early evening. As he was driving on Highway 92, someone shot at him but missed, hitting his car door a few inches below the window. Dr. Hurwitz drove to a nearby police

---

[2] Mr. Cooper testified he received no money but acted as a go-between because he wanted to show Dr. Moalem he was a "big shot" who knew "people that would do things like that."

station and told Sergeant Phillip Derr that he was driving along when a sudden bang occurred. Hurwitz told Derr he knew of no one who would try to shoot him.

Appellant failed to show for a second appointment he had with Dr. Hurwitz the next day, September 21. He contacted Mr. Cooper, went to his office and told him he had missed.

After the failed attempt to kill Dr. Hurwitz, Dr. Moalem asked his wife Tania to be nice to Dr. Hurwitz and to reassure him, because he was afraid. On October 13, 1976, Dr. Moalem told Tania that another attempt would be made to kill Dr. Hurwitz. He said he would be meeting Dr. Hurwitz at a hospital staff meeting in San Francisco and that on the way home he would take highway 280, but Dr. Hurwitz would take 101, so that they would not be in the same location.

Dennis Agan was arrested on February 9, 1999, for the Hurwitz murder; he was released 18 hours later. Agan entered into a plea agreement whereby he pled guilty to second degree murder of Dr. Hurwitz, and to a 1985 assault with intent to commit murder, and agreed to testify truthfully in this case Agan testified he knew appellant, whose nickname was "Kilo," for 25 years.[3] They were friends and used to get together about three or four times a week to drink and do drugs and drug dealings together at each of their residences and at the Country Roads bar where appellant worked as a doorman. Appellant would supply the drugs. They would use "cocaine, marijuana, Quaaludes, angel dust, heroin, opium. Whatever was around." Agan had a reputation as a good driver, even when he was on drugs.

In 1976 appellant asked Agan to "drive for a hit." He offered to pay him $1,000, and Agan agreed. Agan described a failed attempt to kill Dr. Hurwitz in an alley near a Payless store, where appellant fired a shot but missed. A few days after that appellant told Agan he had to drive again. The two men met in the Country Roads parking lot and smoked a joint. Agan got in the driver's seat of appellant's red Toyota and they sat there

---

[3] Appellant explained during his confession that a 9th grade school teacher who could not pronounce his last name shortened it to "Quilo," and that became his nickname.

for a bit. A third man, Robert Newman, walked up and they passed the joint to him. Newman asked what they were doing. Appellant said they were waiting to take a ride, and Newman got in the car.

They drove to Dr. Hurwitz's office. The light was still on, so they parked in a nearby alley and waited for the victim to leave. After 15 minutes he came out and got in his car. They followed him onto Highway 92, where appellant shot the victim with a rifle as they were driving. Agan watched Dr. Hurwitz' car in his rear view mirror as it veered off the road over a mound and some bushes. Newman said, "We got him," and appellant "high-fived" everyone.

Agan then drove down an access road in Burlingame to a place designated by appellant. Agan got out and walked to the front of the car. Newman stood lookout about 25 feet from the car to be sure no cars were coming. Appellant got out of the car, slammed the rifle in an apparent attempt to break the stock, and threw it out in the water.

After either the first attempt or the murder, appellant said to Agan, "If anything happens, I got my ass covered, and Sidney Cooper has got your picture." Agan responded, "That was really fucked," and that if a bullet is coming, "I don't want to see it coming."

About a week after the murder Agan was waiting to be paid. The three men drove to Sidney Cooper's office. Newman and Agan waited in the car; appellant went in and then came out with Cooper. Appellant said Cooper would call him about the money, and then appellant would call Agan. About a week later appellant called Agan and said to meet him at the Lanai restaurant in San Mateo. Appellant gave Agan $350, some drugs, and drinks and dinner with friends. Agan was displeased with the amount of payment, and appellant said he would give him more later. Within a week after the dinner appellant left for Hawaii to open a business.

Agan next saw appellant a few years later at appellant's mother's house. After that he visited him in the mid-1980s, and in the mid-1990s. Within a few years before trial Agan attended a birthday party appellant gave for his son. The guests were looking at photo albums and pictures, including the Lanai going away dinner party. Appellant

pointed out a newspaper article about the Hurwitz murder and asked Agan, "Remember this?"

William Loveless was working as a teamster on the night of October 13, 1976. At about 9:15 p.m. he was headed east toward the San Mateo bridge on Highway 92, near Highway 101, when a red Mustang containing three men came out from the right-hand side and went straight across the highway in front of him, through the ice plant divider, and then headed west toward San Mateo.

At 9:26 p.m., Foster City Police Officer Tom Allen was dispatched to the scene of a possible injury accident at Highway 92 and Marina Drive. He observed the victim's green and brown Ford station wagon with its front wheels in a culvert or ditch. Firefighters were administering CPR to the victim who had a large wound in the neck. Firefighters including David Ragsdale had been first on the scene. The victim had no pulse and was not breathing. Ragsdale administered CPR all the way to the hospital, but he believed the victim was dead from the time they first encountered him. An autopsy revealed that the victim died of a gunshot wound to the neck. The bullet was shot from a 30-30, 30-06 or .308-caliber rifle which was more than three feet away, entered the left side of the neck, passed through horizontally, and exited the right side.

The morning after the shooting Dr. Moalem told his wife that Dr. Hurwitz had been killed in what was made to look like a drive-by shooting. A couple days later, on October 15, 1976, Dr. Moalem instructed Tania to go to the Russian American Credit Union and get some money for the balance due the shooter. She deposited $4,650 and then withdrew $3,000.[4]

On October 15, Cooper read in the newspaper that Dr. Hurwitz had been shot. The next morning appellant called and said he wanted to come down and get his money. Cooper called Dr. Moalem and told him the man wanted his money. Dr. Moalem said he would have it in three or four hours. Cooper told appellant to come back around 1:00

---

[4] Tania testified that Dr. Moalem told her he was using $5,000 that Dr. Hurwitz had invested in a San Mateo county property to help pay the shooter.

o'clock in the afternoon. When appellant came back the two men drove to 10th and Clement in San Francisco, about a block from Dr. Moalem's office. Appellant stayed in the car; Cooper got out of the car and met Dr. Moalem, who gave him a paper bag. Cooper got back in his car and gave the bag to appellant. Appellant looked in the bag and said he was leaving for Hawaii. Cooper did not see him again for six or seven years.

Susan Mondani worked as a baby sitter for Tania Moalem from the time her first son was six months old until he was fourteen. The two women became friends and knew each other for 23 years. In 1995, Tania told Ms. Mondani she was afraid Dr. Moalem was going to kill her. She said he had had it done before. Tania talked to Ms. Mondani about the subject again in the spring of 1996, stating her husband had arranged to have his business partner killed.

On January 9, 1995, Tania Moalem consulted attorney Doron Weinberg. She told him her husband was responsible for the murder of his business partner, and that she was afraid of him.

Robin Krane represented Tania Moalem as a divorce attorney. In April 1998, Ms. Krane accompanied Tania to her safe deposit box, where she removed a document and showed it to the attorney. Although in the form of a letter to her brother, Ms. Krane characterized the document as "sort of a last will and testament." In it Tania expressed to her brother that in the event of her death he should be suspicious of William Moalem, of whom she was fearful, because he had had his business partner Benny killed. In particular, Dr. Moalem had hired a killer through Sidney Cooper. Also, Tania told Ms. Krane that Dr. Moalem had threatened to kill her. Tania destroyed the letter against her attorney's express advice.

Appellant's brother, Michael Quilopras, shared a house with appellant in 1976. Their father stayed with them on weekends in appellant's room. Their father owned a 30.06 rifle with a scope, which he stored in the closet there. Michael remembered that appellant left for Hawaii sometime in 1976. Approximately two months after appellant left, Michael discovered $1500 was missing. On March 10, 1999, about a month before trial, Michael told the police in a tape-recorded statement, that he had last seen the 30.06

rifle before his brother went to Hawaii in 1976, that it was missing about the time appellant went to Hawaii, and that he had never seen it since.

Detective Steven Archer arrested appellant at his home on August 12, 1999. Archer handcuffed appellant, advised him he was in custody, and read him his *Miranda* rights from a card.[5] Appellant stated that he understood his rights. He was taken to the Foster City police station and interviewed for about two hours by Detective Archer and Inspector Kat Colson of the district attorney's office. The videotape (Exhibit 64) which contained the entire interview, was played for the jury, and they were given transcripts of the videotape as well (Exhibit 65).[6] In that interview, which is the subject of discussion below, appellant denied being in the car from which the fatal shot was fired, but admitted that he was involved in the murder of Dr. Hurwitz, in that he was the middle man who received the money from Sid Cooper and delivered it to two other men, Dennis and Jeffrey, who did the driving and shooting.

Detective Archer and Inspector Colson interviewed appellant again the next day, August 13, 1998, at 10:35 a.m. The videotape of the interview (Exhibit 66) was played for the jury, and a transcript (Exhibit 67) of the videotape was distributed to them.[7] Archer advised appellant of his *Miranda* rights.[8] Appellant indicated that he understood.

---

5 The card read: "You have the right to remain silent. Anything you say can and will be used against you in a court of law. [¶] You have the right to talk to a lawyer and to have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before questioning, if you wish. [¶] You can decide at any time to exercise these rights and not answer any questions or make any statements. [¶] Do you understand each of these rights as I have explained them to you?"

6 We have reviewed the transcript and the videotape.

7 We have reviewed the transcript and the videotape.

8 Archer said, from memory, "You have the right to remain silent. Anything you say can be used against you in the court of law. You have a right to speak with an attorney and have an attorney present with you before answering any questions. If you can't afford to hire an attorney one will be appointed to represent you free of charge basically. Um, you can decide at any time to exercise these rights and not answer

About a minute later, after Archer complied with appellant's request that he turn off the tape recorder (appellant appeared unaware that the interview was being videotaped), Detective Archer said, "You know, if you want to, we'll get up and leave and will call you an attorney. It isn't going to change where you are at. Okay? You'll still be here. There will still be a massive case against you."

Appellant continued to take the position that Dennis was the driver and Jeffrey the shooter. Archer told appellant he could not find any record of a Dennis Haygen or Huygen, and asked him to confirm the spelling of the name. Appellant said he had not seen him for 12 or 15 years.

Appellant described his involvement in the conspiracy as follows: "He [Sid] came to me and told me that, ah, he wanted a, he had a doctor friend that, ah, um, had a partner that he wanted to, that he wanted to have his partner, ah, eliminated. And, ah, if, ah, I was interested in taking the job or if I knew anybody. And I told him I wasn't interested but I might know somebody that would be. And, um, I asked him how much, he told me six. I told him they wanted front money and, ah, we discussed that. When it happened, they would get paid that same day or the next day that, ah, they did it so they wouldn't have to go see him again. He was able to come up with the 2,000 cash . . . ."

Appellant said the plan to shoot the victim on the freeway was made by Jeff (since deceased) and Dennis, the shooter and the driver, not by himself or Dr. Moalem. He described the failed attempt to kill Dr. Hurwitz on the freeway, stating Jeff and Dennis followed the victim in a red Toyota and that he followed them in a separate car and observed the attempt as well as the victim's driving to the police station. Appellant denied being present at the fatal shooting, because he was "tired of just waiting."

At the close of this interview appellant agreed that the officer had read him his rights before both interviews and that he talked with them voluntarily.

---

questions or make any statements. Do you understand each of these rights as I've explained them?"

Detective Archer and Inspector Colson interviewed appellant a third time, the next day, on August 14, 1998. An audiotape of the interview (Exhibit 68) was played for the jury and they were given a written transcript of it to review (Exhibit 69).[9] Detective Archer reminded appellant, "[O]kay you remember when I read your rights off the card [before the tape recorder got here]?" Appellant said yes. Archer said he did not believe the "Dennis part" of appellant's story, that is Dennis being the driver, because his search had revealed no one named Dennis Hagan, although he had found a Dennis Agan who had hung out at appellant's bar. Appellant said the driver was not Dennis Agan.

At this point Detective Archer said he wanted to clear up a few points, but first he reminded appellant of his right to have an attorney, and appellant again stated he chose to talk without an attorney present. Archer proceeded to go over appellant's story point by point. A few moments into it Archer said appellant seemed angry and upset and perhaps they should terminate the interview. But appellant said no, and added, "I tell you everything, every time."

After further discussion, Archer said he had only 30 minutes more to talk to appellant. Appellant asked why, and Archer said, "because you're going to go up to arraignment and they're going to give you an attorney." Appellant replied, "They're not going to give me, I'm going, I'm going, like I told Kat yesterday, I'm going to deny the attorney. I don't want a court appointed attorney, okay? [¶] . . . [¶] So I won't have an attorney so you can't say you can't talk to me anymore because I won't have an attorney until I hire my own."

Appellant again reiterated his story. He described three unsuccessful efforts, including the two shootings by Jeff and Dennis to kill Hurwitz, and insisted that he was at home the night of the second (fatal) shooting.

The defense called Peter Keane, an attorney, former chief assistant public defender, certified criminal law specialist, and Dean of Golden Gate University School of Law, who testified for the defense as a criminal law expert about Agan's immunity

---

9 We have reviewed the transcript and audiotape.

agreement. He stated that Agan was facing two consecutive prison terms of seven years to life for first degree murder and for conspiracy to commit murder of Dr. Hurwitz. Agan was also charged with a murder he committed in 1985, for which he was facing a possible death sentence. If Agan did not carry out his agreement, he could be prosecuted for the 1976 and 1985 crimes and receive all three sentences.

The document, entitled "Agreement to Provide Truthful Testimony," was prepared by the district attorney. Keane testified that in the context of that agreement "truth" meant "that Mr. Agan . . . has to go ahead and say what he said in his interview with the police and the district attorney about the way these crimes happened. [¶] And if he does not testify in that fashion, according to what he has told them occurred, then that would be considered his not telling the truth and his bargain would be off."

The People called Martin Murray, an assistant district attorney and an expert in the law of homicide, in rebuttal. He testified that Agan was obligated to tell the truth to the police and in his testimony. If the district attorney thought Agan breached the agreement he could reinstitute murder charges against him, but ultimately the determination would be made by a judge. He could not, however, be punished for both the conspiracy to commit murder and the murder of Dr. Hurwitz, under section 654 of the Penal Code.

Richard Mason, a forensic pathologist, was called by the defense as an expert in wound ballistics. He testified that the fatal wound appeared to be from a rifle cartridge from one of about a dozen common rifles such as a 30-30, a 308 Winchester, or a 30-06, or one of a couple of particular handguns that fire rifle cartridges. He thought it would not take a great deal of skill for the shooter in one moving car to hit the victim in another car.

Michael Peck, a sergeant with the San Mateo County Sheriff's office, testified in rebuttal as an expert on firearms and ballistics. He stated that the difficulty of the shooting would depend greatly on the type of weapon used. A single-shot rifle would be more difficult; a shotgun would have more room for error. In this case if the shooter used a scope, it is likely that he aimed at the victim's head, and the close range trajectory resulted in the wound being to the neck.

Discussion

Appellant's First Statement

Detective Archer testified at the pretrial hearing on admissibility of appellant's statements. He arrested appellant in his home on August 12, 1998. Upon arriving at the home, Archer asked appellant to step outside, told him he was under arrest for the Hurwitz homicide, handcuffed him, and advised him of his *Miranda* rights, reading from a card.[10] He and another officer drove appellant to the Foster City police station while other officers searched the home pursuant to a warrant. On the 20-minute ride to the police station the two officers did not ask appellant anything; they engaged in neutral conversation. Appellant did not ask to speak to an attorney.

At the beginning of the first interview Archer asked appellant if he remembered "the stuff I read," or if he should read it again. Appellant shook his head, indicating that was not necessary. Archer told appellant that Sid Cooper and Tania Moalem had talked with officers and told them "the whole story," including that Dr. Moalem got Sid to hire appellant. In this interview appellant denied that Sid ever gave him any money. Detective Archer said he did not want to waste his time talking to someone who did not want to talk to him. Appellant replied, no, he just wanted to ask a question, and a little later insisted that he had been cooperative from the moment he was arrested.

Detective Archer told appellant they had a good case against him but that he could help himself if he did not actually pull the trigger but was "just driving the car." "If you were the murderer, then you shouldn't be talking to me." Appellant replied he "wasn't even in the car."

---

[10] Archer read: "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have them present with you while you're being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements. Do you understand each [of] these rights as I've explained them to you?" Appellant said yes.

About halfway through the two-hour interview Detective Archer told appellant that there was no bail set for him because he was in custody on a murder charge. At this revelation appellant's mood visibly changed for the worse. As the discussion continued, appellant began to softly cry, which he continued to do on and off during the remainder of the interview.

The next time Archer asked appellant who was in the car with him the night of the murder, appellant said, "You said I could make a phone call to my wife?" Archer said, "Yeah, you can. I'd really like to get past this point, though if we could and then you can call her for as long as you want." Archer proceeded to ask appellant about who was in the car and who pulled the trigger. Appellant continued to answer stating he was not in the car, but then went on to describe the car in which the shooter rode.

Appellant bases his first contention on the exchange which occurred next. Appellant said, "I don't mean to be rude to you people. [¶] . . . [¶] I have to speak to an attorney." Detective Archer responded, "That's fine. Go ahead and get on the phone there [indicating]. You have an attorney you want to call? Have him come on down." Kat Colson said, "Okay." Appellant then said, "You said I'm not going to have no bail or nothing right?" Kat Colson responded, "Correct." Archer explained, "Well, that's the way it is now. Unless things change . . . what you've told us now has only hurt your situation, you know. You started to tell one story and, and it was going to be a story that put you in a better light and all of the sudden you can't tell that story 'cause, why I don't know. Is it because it's not true or so I think you need to have your attorney get in touch with the D.A. and if there really is a truthful story that puts you in a less, lesser light, you need to share it pretty quick. But do it through your attorney."

Appellant then addressed Colson, "Um, the ma'am?" Colson, "Sure, go ahead." Appellant: "Ah, I promise, I promise I'll, I'll talk to you tonight, okay? I promise I'll talk to you tonight." Colson: "Okay." Appellant: "Um, I just want to talk to my wife." Colson, "You got it, man." Archer: "Go for it. Dial 9."

Appellant dialed twice, crying, but could not get through. It appeared that officers were still searching the house and would not permit his wife to answer the phone.

Without hesitation, Detective Archer endeavored to arrange the call, stating he would call the officers at the house and have them bring appellant's wife to the phone. He would also arrange to have the wife's car keys returned to her from appellant, who had inadvertently taken them with him at the time of arrest.

In the midst of discussion of these arrangements, appellant said, "Can I ask you something, sir?" Archer replied, "Sure." Appellant asked, "Did, did, ah, is that true what Sid said that, ah, the doctor, the wife . . . ." Archer, "Narked[**11**] him off? Yeah, pretty much." Appellant: "Really?" Archer: "Yeah, she, she narked off, or narked off you and Sid both." Appellant: "See, I didn't even know her." Archer explained that Dr. Moalem was "beating on her and cheating on her," which made her "up tight," so she talked to the district attorney about her husband, and other names came up. Also, Archer continued, Sid talked to the police and since he did not pull the trigger Archer was interested in what Sid had to say about who he hired and who was the shooter.

At this point appellant asked, "You know who hired the people? [¶] . . . [¶] Moalem hired the people," and the conversation continued briefly until appellant was able to make the call to his wife.

Appellant contends that evidence of this first interview should have been suppressed because Detective Archer, in violation of *Miranda*, continued to interrogate him after he invoked his right to counsel, and because even if *Miranda* error did not occur, his admissions were neither knowing and intelligent nor voluntary. The trial court found, based on the totality of the evidence before it, that appellant waived his *Miranda* rights, his right to counsel, and his right to remain silent.

In considering appellant's claim our scope of review is well established. "[W]e accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. We independently determine from the undisputed facts, and the facts properly found by the trial court whether the challenged

---

11 The Oxford English Dictionary defines "nark" as a slang term meaning "To act as an informer." (Oxford English Dictionary (2d ed. 1997 <http://oed.com/>.)

statement was illegally obtained. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 992 (*Cunningham*).)

"The privilege against self-incrimination provided by the Fifth Amendment of the federal Constitution is protected in 'inherently coercive' circumstances by the requirement that a suspect not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and, if indigent, to appointed counsel. (*Miranda* [*v. Arizona* (1966)] 384 U.S. 436, 444-445, 473-474; [citations].) 'If a suspect indicates "in any manner and at any stage of the process," prior to or during questioning, that he or she wishes to consult with an attorney, the defendant may not be interrogated.' [Citations.]" (*Cunningham, supra*, 25 Cal.4th at p. 992.)

"A suspect, having invoked these rights, is not subject to further interrogation by the police until counsel has been made available to him or her, unless the suspect personally 'initiates further communication, exchanges, or conversations' with the authorities. (*Edwards v. Arizona* (1981) 451 U.S. 477, 484-485; [citations].)" (*Cunningham, supra,* 25 Cal.4th at p. 992.)

Here, appellant's statement, "I have to speak to an attorney," was an unambiguous request for counsel. Therefore, under *Miranda* and *Edwards*, appellant should not have been subjected to further interrogation by the police until counsel was made available to him. (*Cunningham, supra,* 25 Cal.4th at p. 993.) Detective Archer's indication that appellant could use the phone on the table in front of him to call his lawyer was not a completely appropriate response to appellant's assertion of his right. But appellant was well aware of his right to have an attorney appointed for him if he could not afford one and we find nothing prejudicial to that right in Archer's truncated response. Furthermore, appellant immediately continued to converse with the police about his eligibility for bail, and for that reason it was permissible for the police to speak to him in a way that did not call for an incriminating response. (*Cunningham, supra,* 25 Cal.4th at p. 993.) It may be argued that Detective Archer's comment to appellant following the request for an attorney ("that's the way it is now") was intended to elicit an incriminating response, but

it did not have that effect. Rather, appellant immediately turned his attention to telephoning his wife, and Detective Archer cooperated and was attempting to accomplish that task for him when appellant asked his question about whether Tania "narked" the doctor. The trial court expressly held that this latter question constituted an initiation for further conversation within the meaning of *Edwards*. We agree.

An accused is properly found to initiate such further communication "when he speaks words or engages in conduct that can be 'fairly said to represent a desire' on his part 'to open up a more generalized discussion relating directly or indirectly to the investigation.' [Citation.]" (*People v. Mickey* (1991) 54 Cal.3d 612, 648.) That is precisely what occurred here. Appellant reinitiated communication about Tania's informing ("narking") on the conspirators, and followed with discussion of the fact that Dr. Moalem hired the driver and shooter. Thus appellant clearly initiated discussion relating directly to the investigation. The fact that he was emotional, crying on and off throughout much of the interview, does not negate the validity of his waiver of his *Miranda* rights or his rewaiving them by initiating communication after requesting counsel. (*Id.* at pp. 645-649; *People v. Waidla* (2000) 22 Cal.4th 690, 731.) The trial court properly found a valid waiver of appellant's *Miranda* rights.

Voluntariness

Appellant also argues that even if, as we hold, he initiated communication within the meaning of *Edwards*, his waiver was not knowing and intelligent, and his statements were not voluntary. Appellant suggests that Detective Archer misadvised him of his *Miranda* rights when, after appellant stated he wanted to speak to an attorney, Archer told him to go ahead and use the phone. Appellant contends that Archer impliedly misadvised appellant that he was required to call an attorney in order to preserve his *Miranda* right. Appellant ignores the fact that, as we stated above, he had been fully advised of his *Miranda* rights and indicated that he understood them. These rights included that an attorney would be provided for him. The fact that appellant did not want an attorney was reinforced and reiterated over the next two days after appellant was readvised of and continued to waive his *Miranda* rights.

Appellant argues that his statements were involuntary because Detective Archer badgered him into waiving his rights, but the record indicates otherwise. It is true that at the outset of the interview Archer referred to the case as possibly a "capital case," which was incorrect, but that was the last mention of this factor; the error was never repeated or used to influence appellant to waive his rights and confess. In fact, Archer repeatedly reminded appellant of his right to counsel, and appellant repeatedly stated he understood his rights and wished to waive them without any indication that possible capital punishment was a consideration. The mere mention of the words "capital case" did not render the confession involuntary. (*People v. Ray* (1996) 13 Cal.4th 313, 340.)

Despite appellant's contentions to the contrary, our review of the entirety of appellant's statements convinces us that the statements were not induced by promises of leniency or by any suggestion that bail would be made easier if he confessed. Appellant repeatedly acknowledged that no promises had been made and that he knew he could expect nothing in return for his statements.

Appellant contends that Detective Archer engaged in deceptive practices which rendered appellant's incriminating statements involuntary. We examine the facts surrounding the statements to make an independent determination whether the prosecution met its burden of showing appellant's statements were voluntary. (*People v. Thompson* (1990) 50 Cal.3d 134, 166.) It appears that Detective Archer exaggerated the strength of the existing case against appellant when, for example, he stated that the victim had seen and described the occupants of the vehicle after the failed shooting. Deception does not necessarily invalidate a confession. (*Id.* at p. 167.) The question raised by claimed psychological coercion is whether the accused's will was overborne so as to bring about confessions "not freely self-determined." (*Id.* at p. 166 [citations omitted].) That is not the case here. The record, including the video and audiotapes, shows an accused who exhibits remorse, particularly for the potential loss of his life with his wife and children, and an uncoerced willingness to discuss the investigation with the authorities. Thus the first statement was properly admitted.

Appellant's Subsequent Statements

Appellant would have his second and third statements fall as the fruit of the poisonous tree of the first, but because we have determined the first statement was properly admitted, that contention must fail.

Appellant's various complaints about Detective Archer's approach during the subsequent interviews are predicated in large part on appellant's assertion of his right to counsel which occurred during the first interview before he reinitiated discussion within the meaning of *Edwards* and thereby waived counsel anew. We observe again that the propriety of admission of all the statements is reinforced by the fact appellant was repeatedly admonished of his *Miranda* rights, repeatedly waived them, and continued to voluntarily tell his version of the events in question.

Appellant complains that during the second interview Detective Archer threatened that he would never see his family again if he did not confess. We do not read the record as supporting this factual assertion. Appellant stated near the beginning of the interview, "I was thinking what guarantee do I have that I'll ever see my family again either way. I got no guarantee." Detective Archer explained that the district attorney would want to talk with appellant or his attorney about his statement. He said they had a strong case against appellant that would keep him incarcerated for the rest of his life, but that it was possible the district attorney would want to make a deal with appellant. The point, reiterated by Ms. Colson was that cooperation would not hurt him and could help him. Stating truthful implications that present cooperation might benefit appellant in future plea negotiations was proper and not coercive. (*People v. Jones* (1998) 17 Cal.4th 279, 298.) Also, appellant concedes that his second statement added nothing significant to the first; therefore if the court erred in admitting it, which we do not hold, it was harmless.

Appellant contends the third statement was coerced because Archer misadvised him about when he could have an attorney. Appellant lifts the detective's statement out of context. Detective Archer read appellant his *Miranda* rights again before the third interview began. A few minutes later Detective Archer reminded appellant he did not have an attorney and "you could have one in an hour and a half," referring to the pending

arraignment. But in the next sentence the detective explained, "You, you then indicated all along you're willing to talk to me . . . I mean, that's my impression anyways, knowing that you have a right to an attorney per the card three times we've gone over it. You've never chosen to have . . . an attorney with you before we talk, is that right?" Appellant replied, "Right," and continued with the interview. It was clear appellant could exercise his right to counsel any time and that he voluntarily chose not to do so and to continue the interviews with the authorities.

Appellant complains that Detective Archer coerced his third statement by promising to help appellant's family. During the interview appellant said he was worried about his family and acknowledged there was nothing Archer could do. Detective Archer then said he was pretty resourceful and that if appellant's family needed help he could "help get them jobs or get them whatever they need from the Welfare people . . ." Promises can invalidate a confession if they constitute psychological ploys which are so coercive that they produce an involuntary and unreliable statement. (*People v. Ray, supra*, 13 Cal.4th at pp. 339-340.) Detective Archer's discussing an advantage which might accrue from appellant's cooperation did not amount to such psychological coercion. This is particularly evident because appellant did not change his story during the third interview.

Thus appellant's contentions regarding admissibility of his three statements must fail, and they, and all evidence flowing from them, were properly admitted.[12]

Robert Newman's Testimony

Dennis Agan testified that Robert Newman was in the back seat of the car during the fatal shooting. During pretrial motions the district attorney stated his understanding that if Newman were called to testify he would assert his Fifth Amendment privilege.

---

12 Further, even if the statements should have been excluded, the evidence against appellant was strong, and his own admissions prior to his asking for counsel during the first interview were sufficient to corroborate the testimony of his accomplices. (*People v. Williams* (1997) 16 Cal.4th 635, 680-681.)

Based on this representation, upon request of the district attorney, the court ruled that the defense would not be permitted to comment negatively on the Peoples' failure to call Newman. However, the court expressly reserved the right of the defense to subpoena Newman and to then determine, out of the presence of the jury, whether or not he would testify. Appellant did not do so. The parties later stipulated that if called Newman would have asserted his right under the Fifth Amendment not to testify in this case.

Appellant now contends the court erred in barring him from referring to Newman, because the witness did not personally appear to assert his Fifth Amendment right. This argument ignores the fact that the court expressly ruled appellant could call Newman to determine whether he was willing to testify.

Appellant also argues that the court erred in overruling his objection to the district attorney's reference to Newman during closing argument. In his closing argument the district attorney referred to a photo that was found in the search of appellant's home which showed appellant, Agan and Newman celebrating the killing of Dr. Hurwitz. The district attorney then asked rhetorically "Why would [Agan] name Newman [as being in the back seat] if that wasn't true? Newman in the back seat. Newman didn't have anything to do with this except being in the back seat and hi-fiving the defendant afterwards. It's an easy way to get caught in a lie if it's not true. It is true. The evidence shows it's true." The court overruled a defense objection, agreeing with the district attorney that he did not imply that the defense failed to produce Newman to rebut Agan's testimony.

No error occurred. The district attorney commented fairly on the evidence before the jury, stating that Agan had no reason to lie. (*People v. Beivelman* (1968) 70 Cal.2d 60, 76-77.) Such comment was distinguishable from, and did not amount to, an improper argument that the defense should be faulted for failing to call Newman.

Juror Misconduct

After both sides rested, juror TRJ012 gave a letter to the court through the bailiff. In it he expressed what he called a "peace of mind" question about whether there was a danger appellant or people connected with him would retaliate against jurors in the event

of a guilty verdict. The court examined juror TRJ012 out of the presence of the other jurors and ascertained that he had discussed his concerns with another juror but had not prejudged the case and would continue to be fair and impartial. The court assured juror TRJ012 that in 30 years of experience in the legal field he had never heard of a juror being harmed by a defendant whom he or she voted to convict.

Defense counsel asked that juror TRJ012 be excused and also moved for mistrial. The court took the first motion under advisement and found the second premature until the court explored the concern with the other jurors.

The court examined the other jurors about whether they had similar concerns about their safety, reminding each one that juror information would be sealed. Juror TRJ09 noted that during voir dire the defense had access to the jurors' names, addresses and places of work. But, when asked, he stated that his concerns had no bearing on the issue of appellant's guilt or innocence. Juror TRJ08 expressed a similar position, having concern about the defense access to personal information, but not having sufficient concern about personal safety as to affect her deliberations.

Juror TRJ03 said that when the matter of juror safety came up in discussion among the jurors at lunch she was a little surprised and thought some jurors were overreacting a bit. She was not worried; it "wasn't a big deal" to her. Other jurors did not hear the discussion and did not have safety concerns.

Appellant moved for mistrial based on the concerns expressed by jurors TRJ09 and TRJ12 and juror misconduct in discussing the matter. The district attorney argued that the jurors had expressed "complete objectivity, complete impartiality," and that their discussing safety concerns among themselves did not constitute misconduct. The court excused two jurors, the one who wrote the note (TRJ012) and the one with whom he discussed it, TRJ09, "out of an abundance of caution." The court explained to the other jurors that it excused the two because they violated the order not to discuss the case.

Appellant complains that Jurors TRJ08 and TRJ03 also engaged in misconduct by discussing the case and should have been excused, thereby reducing the number of jurors below 12 and compelling a mistrial. The evidence before the court supported the

conclusion that the two jurors in question were on the periphery of the safety discussion, did not engage in misconduct, and were not biased against appellant. (*People v. Feagin* (1995) 34 Cal.App.4th 1427, 1434-1435.) Allowing these two jurors to remain was not error and did not deprive appellant of this right to an impartial jury. (See *In re Carpenter* (1995) 9 Cal.4th 634, 648.)

Witness Immunity Agreements

We permitted appellant to file a supplemental brief joining in and adding to discussion of issues raised by Moalem in his appeal. (See *ante*, fn. 1.)

Appellant joins in Moalem's contentions that the prosecutor improperly vouched for witness Sidney Cooper and that Cooper's immunity was improperly conditioned on his telling a story which conformed to one he previously told the district attorney. Our complete review of the record and the applicable authority compels us to reject these claims, as discussed in the *Moalem* opinion. Appellant adds the same two contentions as to Agan, whom, he erroneously states, did not testify at the Moalem trial. We reject these assignments of error for the same reasons we rejected them as to Sidney Cooper and Tania Moalem. (*People v. Fauber* (1992) 2 Cal.4th 792, 821-823; *People v. Phillips* (1985) 41 Cal.3d 29, 46; *People v. Sully* (1991) 53 Cal.3d 1195, 1216-1217.)

The judgment is affirmed.

_____

Stein, Acting P.J.

We concur:

_____

Swager, J.

_____

Marchiano, J.